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## THE INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT: RE-FASHIONING U.S. INTELLECTUAL PROPERTY LAW

“Those who create are rare; those who cannot are numerous.  
Therefore, the latter are stronger.”

—Coco Chanel<sup>1</sup>

### INTRODUCTION

The little black dress is iconic. Enter any woman's closet, and you are sure to find at least one. It has survived decade after decade and encompasses all walks of life: bat mitzvahs, formals, weddings, and of course, funerals. In fact, at one time in history, black dresses were appropriate only for funerals; but in 1926, Coco Chanel altered women's fashion forever by decreeing the little black dress a sophisticated fashion essential.<sup>2</sup>

Fast forward almost ninety years and the little black dress is still as popular as the day it was born. Why the longevity? If individuality is key and we all search for standout pieces that set us apart from one another, why do we all seem to gravitate toward this particular article of clothing? The answer lies in each design's details; it is the variety of little black dresses offered. Every famous designer in the world has put his individual spin on this quintessential piece. For instance, who could forget that extraordinary little black Givenchy dress worn by Audrey Hepburn in *Breakfast at Tiffany's*?

As with other fashion designs, in order to preserve the little black dress for future generations, society must encourage designers to be innovative. European designers have long enjoyed copyright protection over their works, giving them the freedom to create new little black dresses each season without fear of someone else profiting from their creativity. However, American designers have yet to be given such assurance, putting them behind the rest of the world in this area of intellectual property law. This failure to grant fashion designs protection in the United States continues to place a significant roadblock

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1. CAROL TURKINGTON, THE QUOTABLE WOMAN 46 (2000) (appearing originally in “Coco” *Chanel's Style in Wit*, L.A. TIMES (THIS WEEK MAGAZINE), Aug. 20, 1961).

2. JESSA KRICK, *Gabrielle “Coco” Chanel (1883–1971) and the House of Chanel*, METROPOLITAN MUSEUM ART, [http://www.metmuseum.org/toah/hd/chnl/hd\\_chnl.htm](http://www.metmuseum.org/toah/hd/chnl/hd_chnl.htm) (last visited Jan. 14, 2012).

in young designers' paths to break into the fashion market, effectively depriving women around the world of these artists' unique take on this iconic article of clothing.

American fashion designers have long fought for copyright protection over their original fashion designs,<sup>3</sup> and hopefully they will soon succeed in their efforts. In August 2010, Senator Charles Schumer introduced the Innovative Design Protection and Piracy Prevention Act (IDPPPA),<sup>4</sup> a bill granting *sui generis*<sup>5</sup> protection to fashion designs pursuant to the Copyright Clause of the Constitution.<sup>6</sup> If passed, it would amend § 1301 of the Copyright Act,<sup>7</sup> which currently grants *sui generis* protection to designs of boat vessel hulls.<sup>8</sup>

This Note proposes that legal protection should be given to original fashion designs and argues that the IDPPPA is the best U.S. fashion-design copyright law proposed to date. Enactment of the IDPPPA would be a big step forward for U.S. intellectual property law, as well as the fashion industry. This Note explores how courts should interpret the IDPPPA, if it is enacted, by looking at how the European Union has interpreted similar provisions.<sup>9</sup> Given Europe's experience in this area of intellectual property law and the benefits provided by having international uniformity for intellectual property protection, this Note proposes that U.S. courts follow the European Union's interpretation.

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3. Since 1914, Congress has considered more than seventy bills that would grant some form of copyright protection to original fashion designs. See Anya Jenkins Ferris, Note, *Real Art Calls for Real Legislation: An Argument Against Adoption of the Design Piracy Prohibition Act*, 26 CARDOZO ARTS & ENT. L.J. 559, 564 (2008). No bill has ever come into law; thus, U.S. fashion designers continue to lack federal copyright protection. *Id.*

4. Innovative Design Protection and Piracy Prevention Act, S. 3728, 111th Cong. (2010). The IDPPPA was placed on the Senate Legislative Calendar in December 2010 and has not moved forward since that time. See *Bill Summary & Status*, LIBRARY CONG., <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:s.03728> (last visited Sept. 30, 2011).

5. "The term is used in intellectual-property law to describe a regime designed to protect rights that fall outside the traditional patent, trademark, copyright, and trade-secret doctrines." BLACK'S LAW DICTIONARY 1572 (9th ed. 2009).

6. "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8, cl. 8.

7. See 17 U.S.C. § 1301(a)(2) (2006) (granting protection to a vessel's hull and deck, despite their intrinsic utilitarian functions).

8. S. 3728 § 2(a).

9. The European Union (formerly known as the European Community) is made up of twenty-seven member countries. *Basic Information on the European Union*, EUROPA, [http://europa.eu/about-eu/basic-information/index\\_en.htm](http://europa.eu/about-eu/basic-information/index_en.htm) (last visited Apr. 3, 2012). The E.U. was established following World War II in an effort to foster economic cooperation. *Id.* The E.U. "is progressively building a single Europe-wide market in which people, goods, services, and capital move among Member States as freely as within one country." *Id.*

Part II of this Note summarizes the forms of protection that fashion designs are currently afforded in the United States and provides a brief history of designers' and Congress's many attempts to protect fashion designs.<sup>10</sup> It continues with an overview of European fashion law, focusing on French law, U.K. law, and the E.U.'s Regulation on Community Designs (Design Regulation).<sup>11</sup> Part II concludes with an examination of two E.U. design-infringement cases.<sup>12</sup>

Part III summarizes the statutory language of the IDPPPA.<sup>13</sup> Part IV argues that the United States should grant fashion designs protection generally and advocates for the enactment of the IDPPPA specifically.<sup>14</sup> It then compares the IDPPPA with the Design Regulation and suggests how U.S. courts should interpret the IDPPPA.<sup>15</sup> Finally, Part V discusses the impact the IDPPPA could have on designers, retailers, consumers, and litigation.<sup>16</sup>

## II. BACKGROUND

### A. *Current Protection Afforded Fashion Designs*

The limited protection currently afforded designers in the United States may be pieced together to give fashion designs partial protection; however, because Congress and the courts believe clothing's sole purpose is utility, rather than artistic expression, a design as a whole currently remains unprotected. This Part examines trademark, copyright, and design-patent protections as they apply to fashion designs.

#### 1. *Trademark*

Trademark law currently protects designers with strong logos,<sup>17</sup> but this small amount of protection is not a foolproof deterrent against piracy.<sup>18</sup> Trademarks exist when consumers associate a name, phrase, logo, symbol, or slogan with a particular source.<sup>19</sup> This association helps prevent consumer confusion as to the source of an item.<sup>20</sup> In the 1970s, in an attempt to have their designs protected from piracy, de-

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10. See *infra* notes 17–50 and accompanying text.

11. See *infra* notes 51–82 and accompanying text.

12. See *infra* notes 83–130 and accompanying text.

13. See *infra* notes 131–48 and accompanying text.

14. See *infra* notes 149–93 and accompanying text.

15. See *infra* notes 194–215 and accompanying text.

16. See *infra* notes 216–43 and accompanying text.

17. See 15 U.S.C. § 1114 (2006).

18. Kristen L. Black, Comment, *Crimes of Fashion: Is Imitation Truly the Sincerest Form of Flattery?*, 19 KAN. J.L. & PUB. POL'Y 505, 511 (2010).

19. See 15 U.S.C. § 1127.

20. See *id.* §§ 1114(1), 1125(a)(1)(A).

signers placed their trademark-protected logos all over their fashion works.<sup>21</sup> This technique continues to be widely used today. For instance, walk into any Coach store in the United States and one is sure to find hats, shoes, and handbags covered in the designer's logo. So long as designers lack the means to protect their designs as a whole, consumers will likely continue to see this method in practice.

## 2. Copyright

The functionality of apparel currently precludes its protection under U.S. copyright law. The Copyright Act grants protection to "original works of authorship fixed in any tangible medium of expression."<sup>22</sup> Works of authorship include, among others, pictorial, graphic, sculptural, and architectural works.<sup>23</sup>

The Copyright Act currently protects a sketch of a fashion design as a pictorial or graphic work;<sup>24</sup> however, the design itself is not protected because it is considered a "useful article."<sup>25</sup> A useful article is defined as "having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."<sup>26</sup> Any portion normally a part of a useful article is considered a useful article.<sup>27</sup> Only those portions of a useful article "that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article" are granted copyright protection as a pictorial, graphic, or sculptural work.<sup>28</sup> This requires either physical or conceptual separation of the pictorial, graphic, or sculptural aspects of the work from the utilitarian components of the article.<sup>29</sup> Even when this can be accomplished, only the independent, separable aspects are protected.<sup>30</sup> For example, the court in *Celebration International v. Chosun International* held that the body of a tiger costume was clearly not copyrightable because it was not separable from the

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21. See Black, *supra* note 18, at 511.

22. 17 U.S.C. § 102(a).

23. *Id.* Pictorial, graphic, and sculptural works are considered to be two- and three-dimensional works of fine, graphic, and applied art; photographs, prints and art reproductions; and globes, maps, diagrams, charts, models, and technical drawings. *Id.* § 101.

24. See *id.* §§ 101, 102(a)(5).

25. See *id.* § 101.

26. *Id.*

27. *Id.*

28. 17 U.S.C. § 101.

29. Kimberly A. Harchuck, Comment, *Fashion Design Protection: The Eternal Plight of the "Soft Sculpture,"* 4 AKRON INTELL. PROP. J. 73, 90 (2010).

30. *Id.*

costume's clothing function, but that the head was both physically and conceptually separable and thus copyrightable.<sup>31</sup>

Unfortunately for designers, courts have been reluctant to give separate aspects of apparel protection "because most often the design itself, such as the cut of a sleeve, simultaneously serves its function as clothing to 'cover the wearer's body and protect the wearer from the elements.'" <sup>32</sup> Thus, it is very difficult, if not impossible, for many items of clothing to meet the physical and conceptual separability requirements. Despite this, current copyright law does play a small role in the fashion industry: unique fabric prints are copyrightable.<sup>33</sup>

### 3. *Design Patent*

Designers can also seek protection for their fashion designs in the form of a design patent. Design patents protect "any new, original and ornamental design for an article of manufacture" for a term of fourteen years.<sup>34</sup> However, fashion designers are unlikely to gain such protection because "clothing rarely meets the criteria of patentability."<sup>35</sup> If the design of an article is "essential to the use of the article," it cannot qualify for a design patent.<sup>36</sup> Thus, a design patent can only be obtained to protect the ornamental, nonfunctional aspects of the design.<sup>37</sup> As noted above, most aspects of an article of clothing are dictated by their function, effectively disqualifying them from receiving design-patent protection. Furthermore, obtaining a design patent is a lengthy process, with application pendency estimated at twenty-six months.<sup>38</sup> Because fashion designs tend to have a short market life, a design patent is an impractical manner of protecting fashion designs, even if most articles were capable of obtaining such protection.

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31. *Celebration Int'l, Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905, 914–15 (S.D. Ind. 2002). The court found that the head was *physically* separable because it could be easily removed from the costume and sold separately. *Id.* at 914. The court found that the head was *conceptually* separable because the costume could still serve its purpose without the head and the head could stand on its own as a work of art. *Id.* at 915.

32. Emily S. Day, Comment, *Double-Edged Scissor: Legal Protection for Fashion Designs*, 86 N.C. L. REV. 237, 247 (2007) (quoting *Celebration Int'l*, 234 F. Supp. 2d at 912).

33. Fabric prints satisfy the definition of a graphic work. 17 U.S.C. § 101; *see also* *Folio Impressions, Inc. v. Byer Cal.*, 937 F.2d 759, 763 (2d Cir. 1991) (unique fabric design pattern deemed copyrightable).

34. 35 U.S.C. §§ 171, 173 (2006).

35. *A Bill to Provide Protection for Fashion Design: Hearing on H.R. 5055 Before the Subcomm. on Courts, the Internet, and Intellectual Prop. of the H. Comm. on the Judiciary*, 109th Cong. 4 (2006) (statement of Rep. Bob Goodlatte).

36. 69 C.J.S. *Patents* § 113 (2011).

37. *Id.* § 116.

38. Laura C. Marshall, Note, *Catwalk Copycats: Why Congress Should Adopt a Modified Version of the Design Piracy Prohibition Act*, 14 J. INTELL. PROP. L. 305, 312 (2007).

In summary, U.S. trademark, copyright, and patent law fail to afford fashion designs adequate protection. Designers with strong logos or unique prints may gain partial protection over their designs, while young, unestablished designers struggle to gain any protection whatsoever. Due to the utilitarian nature of clothing, both young and renowned designers continue to remain unprotected as to their fashion designs as a whole.

*B. Attempts to Implement Design Protection in the United States*

Congress has considered more than seventy bills granting some form of copyright protection to fashion designs in the last century.<sup>39</sup> In 1913, designers first sought an amendment to the Copyright Act to give copyright protection to fashion designs.<sup>40</sup> In 1930, designers were extremely close to gaining protection for their designs when the House of Representatives passed the Vestal Bill, which provided protection for useful articles.<sup>41</sup> The Senate failed to pass the bill.<sup>42</sup>

Clothing manufacturers were fed up by 1932 and founded the Fashion Originators' Guild of America to protect their designs on their own.<sup>43</sup> Guild members "agreed to sell exclusively to specific retailers who restricted their purchases to only original designs."<sup>44</sup> Unfortunately for the fashion industry, the Supreme Court disbanded the Guild with its decision in *Fashion Originators' Guild of America, Inc. v. FTC*,<sup>45</sup> holding that "[t]he purpose and object of this combination, its potential power, its tendency to monopoly, [and] the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts."<sup>46</sup>

More-recent attempts to protect fashion designs include the introduction of the Design Piracy Prohibition Act in 2006<sup>47</sup> and attempts to pass the Design Piracy Prohibition Act in 2007<sup>48</sup> and 2009,<sup>49</sup> each time

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39. See Ferris, *supra* note 3, at 564.

40. See Harchuck, *supra* note 29, at 76.

41. Congress passed H.R. 11,852 on July 2, 1930. 72 CONG. REC. 12,367 (1930).

42. Harchuck, *supra* note 29, at 77.

43. *Id.*

44. *Id.*

45. See *id.* at 78.

46. *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 467–68 (1941).

47. Design Piracy Prohibition Act, H.R. 5055, 109th Cong. (2006).

48. Design Piracy Prohibition Act, S. 1957, 110th Cong. (2007).

49. Design Piracy Prohibition Act, H.R. 2196, 111th Cong. (2009).

with a slightly revised version. Each attempt failed to gain significant support from Congress and from even the fashion industry itself.<sup>50</sup>

### C. *Design Protection in Europe*

Unlike the United States, Europe has long understood fashion designs as worthy of copyright protection. All E.U. member states are subject to the European Directive on the Legal Protection of Designs<sup>51</sup> and the accompanying Design Regulation.<sup>52</sup> In addition, some European nations provide fashion designs protection by national law.<sup>53</sup> Thus, in some European nations, designers have two avenues through which to seek protection. If the designer fails to register her design under the European Directive, the designer may still seek protection under the laws of her nation.<sup>54</sup> This section focuses on the national laws of France and the United Kingdom, and also outlines the Design Regulation.

#### 1. *France*

Paris has long been regarded as the fashion capital of the world. It should come as no surprise then that France has long afforded fashion designs liberal copyright protection.<sup>55</sup> Fashion designs were first granted protection as applied art in France under the Copyright Act

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50. Cathy Horyn, *Schumer Bill Seeks to Protect Fashion Design*, N.Y. TIMES (Aug. 5, 2010, 10:43 PM), <http://runway.blogs.nytimes.com/2010/08/05/schumer-bill-seeks-to-protect-fashion-design>.

51. Council Directive 98/71, art. 19, 1998 O.J. (L 289) (EC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31998L0071:EN:HTML> ("Member States shall bring into force the laws, regulations or administrative provisions necessary to comply with this Directive not later than 28 October 2001.").

52. Council Regulation (EC) No. 6/2002 of 12 Dec. 2001, art. 111, on Community Designs O.J. (L 3), amended by Council Regulation (EC) No. 1891/2006 of 18 Dec. 2006 O.J. (L 386), available at <http://oami.europa.eu/en/design/pdf/6-02-CV-en.pdf> ("This Regulation shall be binding in its entirety and directly applicable in all Member States."). Directives and regulations differ in that "[d]irectives establish specific objects to be implemented under national law, leaving the precise method and language of implementation to national legislation," while regulations "become part of national law immediately, without legislative intervention or implementation." PAUL GOLDSTEIN, INTERNATIONAL INTELLECTUAL PROPERTY LAW 129 (2d ed. 2008).

53. Day, *supra* note 32, at 266.

54. Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 96.

55. See Day, *supra* note 32, at 266. Two sets of rights are bestowed upon French copyright holders: patrimonial and moral. See Marshall, *supra* note 38, at 319. Patrimonial rights are "the exclusive rights to represent, reproduce, sell or otherwise exploit the copyrighted work of art and to derive a financial compensation therefrom." *Id.* (quoting LOVELLS & PAUL, HASTINGS, JANOSKY & WALKER (Europe) LLP, 2 DOING BUSINESS IN FRANCE § 17.06 (2006)). The moral right is "essentially the right for the author to see both his name and his work of art respected." *Id.* This right does not expire and is granted exclusively to the designer and her heirs. *Id.*



of 1793,<sup>56</sup> with additional protection extended to fashion designs as nonfunctional designs and patterns under the Act of 1909.<sup>57</sup> Under the current copyright laws, French fashion benefits from specific protection,<sup>58</sup> such that infringement of a protected fashion work can result in civil or criminal liability, with a maximum sentence of three years in prison.<sup>59</sup>

In France, copyright protection attaches from the date of the design's creation, as opposed to when the design was first made available to the public.<sup>60</sup> Thus, if the designer can prove the date of creation, he can establish copyright eligibility.<sup>61</sup> Interestingly, the term of protection is not set in stone; rather, it is left to judicial discretion, with judges usually aiming for a term of protection that lasts for the duration that "the design is capable of being effectively exploited."<sup>62</sup>

Proving a design's originality is not explicitly required by French copyright law.<sup>63</sup> Instead, French law allows protection once the design "becomes popular with the general public."<sup>64</sup> This avoids any registration requirement and allows designers to secure protection quickly. Originality is determined only after an infringement case is brought in court.<sup>65</sup> Surprisingly, no particular definition of originality is applied by French courts; the courts decide originality on an ad hoc basis, comparing any designs that may have inspired the protected design.<sup>66</sup>

## 2. *United Kingdom*

The laws of the United Kingdom protect both registered and unregistered designs.<sup>67</sup> "New" Designs with "individual character" can be

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56. Leslie J. Hagin, Note, *A Comparative Analysis of Copyright Laws Applied to Fashion Works: Renewing the Proposal for Folding Fashion Works into the United States Copyright Regime*, 26 TEX. INT'L L.J. 341, 374 (1991).

57. *Id.*

58. *Id.*

59. Ferris, *supra* note 3, at 574.

60. Hagin, *supra* note 56, at 374.

61. *Id.*

62. *Id.* (quoting 2 GUIDE JURIDIQUE DALLOZ § 37, at 204-05 (1987) (trans.)). This term has typically been determined to last between eighteen months and two years. *Id.*

63. See Ferris, *supra* note 3, at 573.

64. See Harchuck, *supra* note 29, at 104 (quoting Day, *supra* note 32, at 266).

65. See Hagin, *supra* note 56, at 380.

66. *Id.*

67. See Ferris, *supra* note 3, at 572. Design is defined as "the appearance of the whole or part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture or materials of the product or its ornamentation." Registered Designs Act, 1949, 12, 13, & 14 Geo. 6, c. 88 § 1(2), amended by Registered Designs Regulations, 2001, S.I. 2001/3949 (Eng.), available at [http://www.legislation.gov.uk/ukSI/2001/3949/pdfs/ukSI\\_20013949\\_en.pdf](http://www.legislation.gov.uk/ukSI/2001/3949/pdfs/ukSI_20013949_en.pdf). A product is defined as "any industrial or handicraft item other than a computer program; and, in

registered under the Registered Designs Act of 1949.<sup>68</sup> To be considered new, the design must not be identical to any design made available to the public prior to the registration date.<sup>69</sup> To have individual character, the design must produce a different overall impression on an informed user than any design previously made available to the public.<sup>70</sup> These requirements often preclude fashion designers from receiving protection, and for that reason U.K. provisions for registered designs are similar to those of U.S. patent law.<sup>71</sup>

The Copyright, Designs, and Patents Act of 1988 grants an unregistered design right to original designs.<sup>72</sup> A design is considered original under the Act if it is not “commonplace in the design field in question at the time of its creation.”<sup>73</sup> An unregistered design right cannot subsist “until the design has been recorded in a design document or an article has been made to the design.”<sup>74</sup>

Infringement of either a registered or unregistered design right occurs when another person copies “the design so as to produce articles exactly or substantially to that design.”<sup>75</sup> A person may also be liable for secondary infringement under the statute if he “(a) imports into the United Kingdom for commercial purposes, or (b) has in his possession for commercial purposes, or (c) sells, lets for hire, or offers or exposes for sale or hire, in the course of a business . . . an infringing article.”<sup>76</sup>

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particular, includes packaging, get-up, graphic symbols, typographic typefaces and parts intended to be assembled into a complex product.” *Id.* § 1(3).

68. Registered Designs Act, 1949, 12, 13, & 14, Geo. 6, c. 88 § 1B(1). Protection under the Registered Designs Act initially lasts five years, but can be extended up to twenty-five years. *Id.* § 13(8), *amended by* Copyright, Designs and Patents Act, 1988, c. 48, § 8, sch. 4 (Eng.).

69. *Id.* § 1B(2).

70. *Id.* § 1B(3).

71. Hagin, *supra* note 56, at 371.

72. Copyright, Designs and Patents Act, 1988, c. 48, § 213. “[D]esign means the design of any aspect of the shape or configuration (whether internal or external) of the whole or part of an article.” *Id.* § 213(2) (internal quotation marks omitted). The design right expires, either

(a) fifteen years from the end of the calendar year in which the design was first recorded in a design document or an article was first made to the design, whichever first occurred, or

(b) if articles made to the design are made available for sale or hire within five years from the end of that calendar year, ten years from the end of the calendar year in which that first occurred.

*Id.* § 216(1).

73. *Id.* § 213(4).

74. *Id.* § 213(6).

75. *Id.* § 226(2).

76. *See id.* § 227(1).

### 3. *The European Union*

Like the United Kingdom, the European Union grants protection to both registered and unregistered original designs. The European Union's requisites for both registered and unregistered designs are essentially identical to the United Kingdom's requirements for registered designs: the design must be new and have individual character.<sup>77</sup> Furthermore, the European Union's definitions of new and individual character are essentially the same as the United Kingdom's.<sup>78</sup>

Registered designs are protected for a term of five years from the date of registration, renewable in five-year installments for up to twenty-five years.<sup>79</sup> Protection for unregistered designs lasts three years from the date the design is first made available to the public.<sup>80</sup> Infringement of an E.U. design right occurs when a design produces the same overall impression on an informed user as the protected design.<sup>81</sup> However, to show infringement of an unregistered design, "it is essential to prove that actual copying has occurred; a design that is merely similar to, or inspired by, the original but is the result of independent creative processes will not be enough to make out an infringement claim."<sup>82</sup>

#### *D. A Look at European Case Law*

By looking at two E.U. design-infringement cases, *J. Choo (Jersey) Ltd. v. Towerstone Ltd.*<sup>83</sup> and *Karen Millen Ltd. v. Dunnes Stores*,<sup>84</sup> it

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77. Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 4(1).

78. Compare *supra* notes 69–70 and accompanying text, with Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 5(1) (providing that a design is considered new "if no identical design has been made available to the public" prior to the unregistered design being made public or prior to the design being registered), and Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 6(1) (providing that a design is thought to have individual character "if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public" prior to the unregistered design being made public or prior to the design being registered).

79. Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 12.

80. *Id.* at art. 11(1).

[A] design shall be deemed to have been made available to the public within the Community if it has been published, exhibited, used in trade or otherwise disclosed in such a way that, in the normal course of business, these events could reasonably have become known to the circles specialised in the sector concerned, operating within the Community. The design shall not, however, be deemed to have been made available to the public for the sole reason that it has been disclosed to a third person under explicit or implicit conditions of confidentiality.

*Id.* at art. 11(2).

81. See Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 10(1).

82. Ferris, *supra* note 3, at 573.

83. *J. Choo (Jersey) Ltd. v. Towerstone Ltd.*, [2008] EWHC (Ch) 346 (Eng.).

84. *Karen Millen Ltd. v. Dunnes Stores*, [2008] 2 I.L.R.M. 368 (H. Ct.) (Ir.).

is possible to anticipate how U.S. courts might interpret the IDPPPA provisions.

1. *J. Choo (Jersey) Ltd. v. Towerstone Ltd.*

*J. Choo* was an infringement case concerning registered and unregistered rights of a handbag.<sup>85</sup> To determine whether the registered design was infringed upon, the court first identified what an informed user would know about the design corpus.<sup>86</sup> The court then “identif[ie]d the overall impression” given by the design and the alleged infringement from an informed user’s viewpoint to determine “whether the impression given for the two [was] the same or different, rather than clearly different.”<sup>87</sup> The court described an informed user as someone with knowledge of an item’s design, in this case a handbag.<sup>88</sup> Not anyone can qualify as an informed user, but one need not be a designer to qualify either.<sup>89</sup> In *J. Choo*, an informed user would “know about the design constraints inherent in handbag design, what features were necessary and unnecessary, and so on.”<sup>90</sup>

The court found the most important feature of the handbag to be the front of the bag because it was the most visible.<sup>91</sup> The court described both handbags in detail,<sup>92</sup> listed their differences, and con-

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85. *J. Choo*, EWHC (Ch) 346, ¶ 1. “In this case there [was] no formal attack on the validity of the registered design, any specific plea of prior designs, or indeed any evidence of any designs available in the prior art . . . .” *Id.* ¶ 10.

86. *Id.* ¶ 6.

87. *Id.*

88. *Id.* ¶ 7.

89. *Id.*

90. *Id.*

91. *J. Choo*, EWHC (Ch) 346, ¶ 7.

92. The court described the plaintiff’s registered design as

[A] large, bucket bag design made up of four panels: two side panels and a front and back. A prominent feature is the double layer of threaded eyelets running around the top. The eyelets are large and are threaded with a strip of fabric, forming a double belt around the top of the bag, which acts to gather the fabric to some extent. The double belt is adjustable by means of a single belt type buckle. It has a horseshoe shape feature on the end of the strap. There is a gap in the threaded eyelets in the centre of the bag where a vertical or longitudinal strap comes across. At its end is one part of a two-part closure. There are two decorative rivets on the strap part of the clasp. Below the clasp is a piece of additional fabric in a bow shape, most clearly visible on the design document but also present in the registered design. Below the clasp and the additional piece of fabric the strap emerges again and appears to go around the whole bag. The strap narrows before it disappears underneath. It is not entirely clear from the design document or the registered design whether the strap is stitched to the bag at this point; in the bag as sold it is not. In the registered design we see the back of the bag where the longitudinal strap passes underneath the corresponding bow feature, this time with no clasp, and is additionally fixed by two rivets at the level of the eyelets. In the registered design there is an additional piece of fabric on the underneath of the bag, which

cluded that the two bags gave the same overall impression.<sup>93</sup> While there were differences in the texture, number of eyelets, shape at the end of the handles, and the existence of the "Jimmy Choo" logo on the buckles, the court explained that the differences were barely noticeable and thus trivial.<sup>94</sup> The court also acknowledged that differences in quality could give rise to a different overall impression, but only when comparing a design to the alleged infringement.<sup>95</sup> In this case, differences in quality were only noticeable when comparing the two handbags.<sup>96</sup>

The court explained that to find infringement of an unregistered design, copying must have occurred.<sup>97</sup> It went on to conclude that "the evidence of similarity [was] sufficient to justify an inference of copying."<sup>98</sup> Therefore, the burden of proof shifted to the defendant to rebut that inference.<sup>99</sup> Because the defendant in this case introduced no evidence at trial to combat the inference of copying, the only question to be resolved was whether the similarities were sufficient to justify a finding of copying.<sup>100</sup> When looking at the two handbags side by side, the court found an "overwhelming" inference of copying.<sup>101</sup> The court essentially applied the same test of overall impression as used in cases of registered designs to determine whether infringement of the unregistered design occurred. The court noted that "[t]he likelihood that these two designs could have been arrived at independently, given the large number of identical features in a design field as free as the present one, seems . . . truly fanciful."<sup>102</sup>

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acts as a belt loop for the strap. More strikingly, the handles, which are a double strap, are made integral with both rows of eyelets and are shaped in a lozenge shape around them with two additional studs or rivets above and below. The handles are of sufficient length to allow carrying over the shoulder or as a carry bag.

*Id.* ¶ 12. The court went on to describe the allegedly infringing design, giving almost the exact same description. *See id.* ¶ 14.

93. *Id.* ¶¶ 15-18.

94. *Id.* ¶¶ 15-18.

95. *Id.* ¶ 20.

96. *Id.* ("[H]ere the differences in quality are really only discernible when comparing the two bags. Comparing the drawing and the representations of the design and the defendants' bag does not give rise to a different impression of quality, in my judgment.").

97. *J. Choo*, EWHC (Ch) 346, ¶ 21.

98. *Id.*

99. *Id.*

100. *Id.* ¶ 22.

101. *Id.* ¶ 23.

102. *Id.*

## 2. Karen Millen Ltd. v. Dunnes Stores

*Karen Millen* was an infringement case regarding rights to an unregistered design of certain shirts.<sup>103</sup> Because the defendant did not deny copying the shirts' designs<sup>104</sup> and the court found that the plaintiff's and the defendant's shirts gave the same overall impression,<sup>105</sup> the case turned solely on whether the plaintiff had a right to an unregistered design for any of the shirts. Thus, the court dedicated a large portion of the opinion to discussing which party had the burden of proof.<sup>106</sup> This involved deciding the proper application of Article 85(2) of the Design Regulation,<sup>107</sup> which provides:

In proceedings in respect of an infringement action or an action for threatened infringement of an unregistered Community design, the Community design court shall treat the Community design as valid if the right holder produces proof that the conditions laid down in Article 11 have been met and indicates what constitutes the individual character of his Community design. However, the defendants may contest its validity by way of a plea or with a counterclaim for a declaration of invalidity.<sup>108</sup>

The court interpreted Article 85(2) to mean that the plaintiff has the initial burden of proving

(i) evidence that the design has been made available to the public within the Community within the meaning of Art.11(2); and

(ii) evidence that the first date upon which it was so made available is within three years of the date upon which the plaintiff claims the right to protection to subsist for the purposes of the alleged infringement; and

(iii) identification of those elements of the design which the plaintiff contends means that the total design produces a different overall impression on an informed user.<sup>109</sup>

If the plaintiff meets this burden, a court would treat the design right as valid.<sup>110</sup> Only then would the burden of proof shift to the defendant to establish a ground for invalidity.<sup>111</sup> If the defendant fails, a court would continue to treat the design right as valid and move on to

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103. *Karen Millen Ltd. v. Dunnes Stores*, [2008] 2 I.L.R.M. 368, 370–71 (H. Ct.) (Ir.).

104. *Id.* at 371.

105. *Id.* at 379.

106. *See id.* at 382–87.

107. *Id.* at 382.

108. *Id.* (quoting Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 85(2)).

109. *Karen Millen*, 2 I.L.R.M. at 385–86.

110. *Id.* at 386.

111. *Id.*

consider infringement.<sup>112</sup> The burden of proving infringement would then rest on the plaintiff.<sup>113</sup>

The court reached this interpretation for several reasons. First, a design could be registered without proof that it met the requirements of novelty and individual character.<sup>114</sup> Thus, any construction that imposed “a significantly higher burden on a claimant to an unregistered Community design, over that imposed on the holder of a registered design” would not be “consistent with the creation of an unregistered Community design without the burden of registration formalities.”<sup>115</sup> Second, Article 11 provides a three-year window of protection starting from the date the design was made available to the public.<sup>116</sup> Insisting that the plaintiff prove that a design was new and had individual character at this stage would be inconsistent with Article 85(2)’s express wording, requiring the plaintiff to indicate what constitutes the design’s individual character.<sup>117</sup> Additionally, requiring the plaintiff to prove novelty and individual character would require proof of a negative: “[W]hat would be the nature of the searches which would be required of a witness who sought to give evidence that in his or her view no identical design has been made available to the public?”<sup>118</sup>

The plaintiff provided evidence that the shirts were offered for sale to the public in December 2005 and that infringement occurred in November 2006.<sup>119</sup> An employee and the creative director of the plaintiff-company each gave evidence as to the features that constituted the shirts’ individual character, including the fabric mix, “K” stitching, seam detail on the cuffs, and fit of the shirt.<sup>120</sup> Accordingly, the court found that the plaintiff met its burden.<sup>121</sup> The burden of establishing that the design lacked individual character therefore shifted to the defendant.<sup>122</sup>

To meet this burden, the defendant argued that it need not compare the unregistered design to a specific design made available to the public prior to the introduction of the unregistered design.<sup>123</sup> Rather, the defendant argued it could defeat the plaintiff’s contention that its

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112. *Id.*

113. *Id.*

114. *Id.* at 384.

115. *Karen Millen*, 2 I.L.R.M. at 384.

116. *Id.*

117. *Id.* at 384–85.

118. *Id.* at 385.

119. *Id.* at 386.

120. *Id.* at 387.

121. *Karen Millen*, 2 I.L.R.M. at 387.

122. *Id.*

123. *Id.* at 395.

shirts had individual character by showing that the shirts' overall impression came from a combination of elements from several different designs previously made available to the public.<sup>124</sup> The court disagreed with the defendant and declared "that the comparison must be between the overall impression created by the whole challenged Community design and the overall impression created by one or more specified earlier designs made available to the public."<sup>125</sup> The court reasoned that the Regulation defined design as "the appearance of the whole or a part of a product"<sup>126</sup> and that a comparison to a part of a product could only happen in limited circumstances, such as when a plaintiff's shirt gives the same overall impression as the top portion of a dress.<sup>127</sup>

The defendant presented two prior designs that it argued gave the same overall impression as the plaintiff's design.<sup>128</sup> The court considered the color, material, and texture of the products and concluded that the plaintiff's shirts had individual character.<sup>129</sup> Consequently, the court found the plaintiff's unregistered design rights valid.<sup>130</sup>

### III. THE INNOVATIVE DESIGN PROTECTION AND PIRACY PREVENTION ACT

Senator Charles Schumer of New York introduced Senate Bill 3728 on August 5, 2010, which proposed the Innovative Design Protection and Piracy Prevention Act.<sup>131</sup> The IDPPPA would afford fashion designs short-term protection pursuant to the Copyright Clause of the Constitution.<sup>132</sup> Similar to its predecessor bills, the IDPPPA seeks to amend § 1301 of the Copyright Act, which currently provides *sui generis* protection to boat vessel hulls. The bill was placed on the Senate Legislative Calendar on December 6, 2010, and has not moved forward since that time.<sup>133</sup>

Under the IDPPPA, a fashion design:

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124. *Id.*

125. *Id.*

126. *Id.* Article 1(a) of the European Directive defines a design as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation." Council Directive 98/71, *supra* note 51, at art. 1(a).

127. *Karen Millen*, 2 I.L.R.M. at 396.

128. *Id.*

129. *Id.* at 397–99.

130. *Id.* at 399.

131. See *Bill Summary & Status*, *supra* note 4.

132. *Id.*

133. *Id.*



(A) is the appearance as a whole of an article of apparel, including its ornamentation; and

(B) includes original elements of the article of apparel or the original arrangement or placement of original or non-original elements as incorporated in the overall appearance of the article of apparel that—

(i) are the result of a designer's own creative endeavor; and

(ii) provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles.<sup>134</sup>

The IDPPPA protects numerous types of articles, such as clothing (including undergarments, outerwear, gloves, footwear, and headgear), handbags, purses, wallets, tote bags, belts, and eyeglass frames.<sup>135</sup> It sets the term of protection for these articles at three years,<sup>136</sup> and it does not contain a registration requirement.<sup>137</sup> Once a protected design is made available to the public, a designer is entitled to institute an action for any infringement that occurs thereafter.<sup>138</sup> The designer has the burden of proving that the design is protected and that it was made “available in such location or locations, in such a manner and for such duration that it can be reasonably inferred . . . that the defendant saw or otherwise had knowledge of the protected design.”<sup>139</sup>

The IDPPPA prohibits deeming a fashion design to have been copied from a protected design if the design “is not substantially identical in overall visual appearance to and as to the original elements of a protected design[ ] or is the result of independent creation.”<sup>140</sup> An article of apparel is “substantially identical” when it “is so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which

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134. S. 3728, 111th Cong. § 2(a) (2010).

135. *Id.*

136. *See id.* § 2(d). Given the short life-span of most fashion articles, three years should be plenty of time for a designer to benefit from his investment. Such thinking is apparent in France, where courts usually grant between eighteen months and two years of protection, and designers often take advantage of such protection. *See, e.g., Ferris, supra* note 3, at 574.

137. S. 3728 § 2(f)(2).

138. *Id.* § 2(g)(1).

139. *Id.* § 2(g)(2).

140. *Id.* § 2(e)(2). The IDPPPA does not include the specific defense to infringement of merely reflecting a trend, though the prior version of the Act did. Design Piracy Prohibition Act, H.R. 2196 § 2(e)(2), 111th Cong. (2009). This is not an oversight by Congress, but rather the requirement that articles be “substantially identical” to find infringement eliminates the need for such a provision because only line-for-line copies will violate the statute. Furthermore, because an article is not considered copied if the design resulted from independent creation, if two designers following a trend happen to design identical replicas of one another's work independently, there is no liability.

are merely trivial.”<sup>141</sup> The IDPPPA specifies that the use of specific colors or of a pictorial or graphic work on the article cannot be used to determine whether a design is protected.<sup>142</sup>

To constitute infringement, one must copy the protected article without the owner’s consent.<sup>143</sup> The burden is on the designer to prove a design has been infringed.<sup>144</sup> The IDPPPA declares that it is not infringement to make, have made, import, sell, offer for sale, advertise, or distribute any article embodying a design that was created without knowledge—either actual or reasonably inferred from the totality of the circumstances—that a design was protected.<sup>145</sup> Furthermore, illustrations of protected designs in a book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium do not amount to infringement.<sup>146</sup> Making a single copy for personal use is also not considered infringement.<sup>147</sup> Finally, the doctrines of secondary infringement or secondary liability apply under the bill.<sup>148</sup>

#### IV. ANALYSIS

This Part argues that fashion designs are deserving of protection and that the IDPPPA is the appropriate law to do it. It then compares the IDPPPA with the Design Regulation. Finally, it examines the European Union’s interpretation of the Design Regulation and argues that U.S. courts should interpret the IDPPPA in a similar fashion.

##### *A. The United States Should Grant Fashion Designs Protection*

The United States should grant protection to fashion designs because doing so would boost the economy, help new designers enter the market and compete with designers abroad, increase innovation in the fashion industry, be consistent with other grants of protection to useful articles, and bring the United States in line with other nations and international agreements.

The United States is behind the rest of the world in this area of intellectual property law. Many European designers have two ave-

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141. S. 3728 § 2(a)(2)(B).

142. *Id.* § 2(c). When considering this provision in conjunction with other provisions in the bill, it seems logical to assume Congress intended the use of specific colors or pictorial or graphic works to be considered trivial characteristics that cannot be used to determine infringement. *See id.* § 2(a)(3).

143. *Id.* § 2(e)(2).

144. *Id.* § 2(g)(2).

145. *Id.* § 2(e)(1).

146. *Id.* § 2(e)(2).

147. S. 3728 § 2(e)(3).

148. *See id.*

nues for legal protection;<sup>149</sup> most U.S. designers have none.<sup>150</sup> Design piracy threatens the U.S. fashion industry.<sup>151</sup> The fashion industries of European countries that protect fashion designs have boomed while the United States' competitiveness, both internationally and domestically, has seriously declined.<sup>152</sup> "[T]he correlation between copyright protection for fashion works and a thriving fashion industry suggests that copyright protection for fashion works is instrumental in the development of market share in the apparel industry."<sup>153</sup> Granting protection to fashion designs could help the economy. An estimated total of 750,000 American jobs<sup>154</sup> and \$12 billion each year in apparel revenue, which accounts for approximately five percent of the U.S. apparel market, have been lost to piracy.<sup>155</sup> Granting protection to fashion designs could "generate unexploited revenue and that new income stream could lead to jobs."<sup>156</sup>

American designers' lack of protection leaves them at a disadvantage to European designers.<sup>157</sup> New American designers have a hard time entering the market because infringers can steal designs and profit from them before the true creators can sell them to the public. Nowadays, fashion copies can be made rapidly and cheaply.<sup>158</sup> Live broadcasts of fashion shows can be transmitted to low-cost, overseas manufacturers, which can create copies of the latest designs.<sup>159</sup> Due to the availability of express shipping, these copies can enter the market quickly.<sup>160</sup> Consequently, thousands of inexpensive copies of a designer's new creation can potentially be produced and sold within weeks.<sup>161</sup> A great example of this involved a dress designed for Carolyn Bassette Kennedy by American designer Narcisco Rodriguez.<sup>162</sup> Before Rodriguez could produce and sell the dress for his own collection, an estimated eight million copies had already been

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149. See *supra* notes 51–54 and accompanying text.

150. See *supra* notes 21–43 and accompanying text.

151. See Hagin, *supra* note 56, at 343.

152. *Id.* at 343–44.

153. *Id.* at 344.

154. Harchuck, *supra* note 29, at 117.

155. Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 NW. J. TECH. & INTELL. PROP. 147, 157 (2010).

156. See Harchuck, *supra* note 29, at 117.

157. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1176–77 (2009).

158. *Id.* at 1171.

159. *Id.*

160. *Id.*

161. *Id.*

162. Day, *supra* note 32, at 242.

sold by a knockoff designer.<sup>163</sup> If nothing is done to stop this, American designers will likely migrate to Europe, where their designs can be protected.<sup>164</sup>

Protecting fashion designs could also increase innovation.<sup>165</sup> Designers spend time and money developing new designs, and, when cheap copies of their artistic works are made available to the public, the profitability of the designs is drastically reduced.<sup>166</sup> Designers' inability to profit fully from their creative efforts reduces the incentive to create new designs in the first place.<sup>167</sup>

Not everyone agrees with this proposition, however. Kal Raustiala and Christopher Sprigman, two distinguished law professors who have been extremely influential in the debate surrounding this issue, have argued that copying actually benefits the fashion industry.<sup>168</sup> They claim that once copies saturate the market, the design becomes less desirable, giving the design a shorter life-span and necessitating new designs and trends, thereby spurring innovation.<sup>169</sup> The two have made the argument that fashion prices would rise if protection was granted to fashion designs and, consequently, that the need to create new designs would decline.<sup>170</sup> This argument is flawed because it assumes protection would extend to substantially similar copies, not just "substantially identical" copies.<sup>171</sup> Under the IDPPPA, a designer would be free to join a trend and alter details to make it different without any liability. Furthermore, if designers did in fact benefit from copies, "they could induce the obsolescence themselves by taking a lax approach to counterfeits, or by engineering products de-

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163. *Id.*

164. Beltrametti, *supra* note 155, at 172.

165. See Hemphill & Suk, *supra* note 157, at 1174.

166. *Id.*

167. *Id.* A disproportionate effect occurs between young designers without any sort of protection and established designers who remain protected by trademark. *Id.* at 1176. Without means to protect against design copying, young designers are discouraged from innovating altogether. *Id.* On the other hand, the legal advantage of trademark protection creates an incentive for established designers "to create some kinds of products over others"—articles covered in logos, such as handbags. *Id.* at 1177. Regrettably, this method of ensuring protection avoids creative thinking, consequently depriving the public of innovative designs. If original designs were afforded protection, one "would expect to see greater range and variety in fashion innovation." *Id.* at 1180.

168. See Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1717–34 (2006).

169. *Id.* at 1721–22.

170. Kal Raustiala & Christopher Sprigman, Op-Ed., *Why Imitation Is the Sincerest Form of Fashion*, N.Y. TIMES, Aug. 13, 2010, at A23.

171. See Hemphill & Suk, *supra* note 157, at 1181–82 ("[I]t is important to disaggregate the phenomenon of close copying from the phenomenon of trends.").

signed to fall apart quickly.”<sup>172</sup> Because they do not do so, one should assume designers do not view copies as beneficial.<sup>173</sup> As Coco Chanel once stated, “Fashion is made to become unfashionable.”<sup>174</sup> There will always be trends; designers need not create obsolescence to ensure that new designs will be needed.

Currently, fashion designs do not generally receive copyright protection in the United States because they are considered useful articles. The mere fact that fashion is put to a functional use does not make it any less deserving of copyright protection than other forms of art. This premise has been demonstrated by the United States’ willingness to extend short-term protection to certain types of useful articles. For instance, Congress already grants designs copyright-like protection to vessel hulls,<sup>175</sup> which are useful articles in their own right. Congress also added an entirely new category of copyrightable subject matter when it added architectural works to the Copyright Act in 1990.<sup>176</sup> Fashion, like architecture and vessel hulls, serves a utilitarian purpose, yet has the capability to merge function with artistic design. Given these similarities, Congress should afford fashion designs the same respect it has afforded architecture and vessel hulls and create either a new category of copyrightable works for fashion designs or grant fashion designs copyright-like protection.

Finally, the United States is one of few countries party to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) exporting fashion that does not offer protection to fashion designs.<sup>177</sup> To comply with the Berne Convention, the United States made architectural works copyrightable;<sup>178</sup> granting fashion designs protection could further strengthen the United States’ compliance with the Berne Convention.<sup>179</sup> Passing the IDPPA could also

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172. *See id.* at 1184.

173. *See id.*

174. *Just a Simple Little Dressmaker*, LIFE, Aug. 19, 1957, at 113, 114.

175. *See* 17 U.S.C. § 1301(a)(2) (2006).

176. The Architectural Works Copyright Protection Act is housed in Title II of the Copyright Amendments Act of 1990. H.R. REP. NO. 101-735, at 3 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6935. President George H.W. Bush signed the Act into law in 1990. *See* Pub. L. No. 101-650, 104 Stat. 5133, 5137.

177. Black, *supra* note 18, at 522; *see also* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified at 17 U.S.C. § 101). The Berne Convention contains a national treatment provision, such that copyright-protected works in a signatory country are entitled to receive the same protection as domestic copyright-protected works in all other Berne Union countries. Berne Convention for the Protection of Literary and Artistic Works, art. 5, Sept. 9, 1886, *revised* July 24, 1971 (Paris), 25 U.S.T. 1341, 828 U.N.T.S. 221.

178. 17 U.S.C. § 102; *see also* H.R. REP. NO. 101-735, at 6.

179. Black, *supra* note 18, at 522. Works of applied art (of which fashion designs can be considered a field) are considered protected under the Berne Convention; however, each signa-

“strengthen the United States’ trade relationship with other Berne Union nations.”<sup>180</sup>

### B. Congress Should Enact the IDPPPA

Predecessor bills to the IDPPPA left the standard of infringement much too open-ended.<sup>181</sup> Under proposed versions of the Design Piracy Prohibition Act, for example, a fashion design would not be deemed to have been copied from a protected design if it were both original and not “closely and substantially similar” in overall visual appearance to that of the protected design.<sup>182</sup> With a much narrower standard, the IDPPPA requires alleged infringers to prove that their design is a “non-trivial” variation over prior designs<sup>183</sup> and only finds infringement when copies are “substantially identical” to the original.<sup>184</sup> The IDPPPA gives further guidance by noting, “The presence or absence of a particular color or colors or of a pictorial or graphic work imprinted on fabric shall not be considered in determining the protection of a fashion design . . . or in determining infringement . . . .”<sup>185</sup> The IDPPPA’s much narrower standard is important to the fashion industry because it would allow designers to gain inspiration from other designers’ previous designs without necessarily infringing on them. Prior attempts at legislation did not give designers such assurance, which is a major reason why they failed. Additionally, the narrower standard also provides courts with a clear standard to apply.

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tory country can determine to what extent and under what conditions protection extends to works of applied art. Berne Convention for the Protection of Literary and Artistic Works, *supra* note 177, at art. 2(7). Given that the United States is among the minority of fashion-exporting Berne Union countries not protecting fashion designs, extending protection would bring the United States more in line with the copyright standards of the rest of the world.

180. Black, *supra* note 18, at 522. Intellectual property protection is undeniably linked to trade. If other nations consider the United States to have inadequate levels of copyright protection, it is possible they might impose trade sanctions in an effort to encourage change. Furthermore, if foreign designers were granted similar protection in the United States to that provided in their own countries (by means of the national treatment provision of the Berne Convention), they would be more inclined to bring their products and talent to the United States.

181. A number of commentators have pointed out that prior versions lacked guidance as to what constituted infringement. See, e.g., Beltrametti, *supra* note 155, at 165; Ferris, *supra* note 3, at 583; Marshall, *supra* note 38, at 328.

182. Design Piracy Prohibition Act, S. 1957 § 2(d)(2)(C), 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2196 § 2(e)(2), 111th Cong. (2009).

183. S. 3728, 111th Cong. § 2(a)(2) (2010).

184. *Id.* § 2(e)(2).

185. *Id.* § 2(c).

The IDPPPA also includes pleading requirements<sup>186</sup> and a home-sewing exception,<sup>187</sup> both of which prior versions lacked. The pleading requirements would give courts and litigants a clearer idea of what the litigants are expected to prove, and the home-sewing exception would ensure that individuals who make a single copy for personal use will not be dragged into expensive litigation. Prior versions also required fashion designs to be registered,<sup>188</sup> while the IDPPPA would eliminate formal registration requirements.<sup>189</sup> By eliminating the registration requirement, the IDPPPA would make it easier, faster, and cheaper for designers to receive protection. Because most fashion articles have a brief market life, this revision would greatly benefit designers.

Congress should enact the IDPPPA because of its newfound support as a result of its much narrower standard of infringement. The IDPPPA now has the support of the Council of Fashion Designers of America (CFDA) and the American Apparel & Footwear Association (AAFA).<sup>190</sup> The CFDA “represent[s] the creative core of the fashion industry,” while the AAFA “represents more than 700 manufacturers and suppliers” and accounts for approximately seventy-five percent of the fashion industry’s business.<sup>191</sup> The AAFA opposed predecessors to the IDPPPA because it believed the standard of infringement “was too broad and would expose its members to lawsuits.”<sup>192</sup> Intellectual property legislation tends to be “enacted when a sufficiently well-organized and well-funded group lobbie[s] for protection without potent opposition.”<sup>193</sup> Thus, having this strong new support behind the IDPPPA should help achieve enactment.

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186. A claimant must plead that

(A) the design of the claimant is protected under this chapter;

(B) the design of the defendant infringes upon the protected design as described under section 1309(e); and

(C) the protected design or an image thereof was available in such location or locations, in such a manner, and for such duration that it can be reasonably inferred from the totality of the surrounding facts and circumstances that the defendant saw or otherwise had knowledge of the protected design.

*Id.* § 2(g)(2).

187. *Id.* § 2(e)(3).

188. Design Piracy Prohibition Act, H.R. 5055 § 1(e), 109th Cong. (2006); Design Piracy Prohibition Act, S. 1957 § 2(e), 110th Cong. (2007); Design Piracy Prohibition Act, H.R. 2196 § 2(f), 111th Cong. (2009).

189. S. 3728 § 2(f)(2).

190. Horyn, *supra* note 50.

191. *Id.*

192. *See id.*

193. Beltrametti, *supra* note 155, at 148.

C. *Comparison of the Design Regulation to the IDPPPA*

The IDPPPA seems to be modeled after the Design Regulation, given that the IDPPPA's definitions of design, requirements for protection, term of protection, and exceptions to infringement are comparable to those of the Design Regulation.

The IDPPPA's definition of a fashion design is very similar to the European Union's definition of design.<sup>194</sup> The only minor difference is that the IDPPPA does not consider colors when determining whether a design has a right to protection or whether it is being infringed.<sup>195</sup>

Furthermore, the IDPPPA's requirement that an article be "the result of a designer's own creative endeavor[] and provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs"<sup>196</sup> is comparable to the European Union's requirements that a design be new and have individual character<sup>197</sup> and that purely utilitarian features of an article not be protected.<sup>198</sup> Also, the IDPPPA provision that a design has not "been copied from a protected design if that design is not substantially identical in overall visual appearance to and as to the original elements of a protected design"<sup>199</sup> seems to be modeled after the European Union's requirement of individual character.<sup>200</sup>

Under both the IDPPPA and the Design Regulation, unregistered designs are protected for a term of three years.<sup>201</sup> Moreover, the standard of infringement for the IDPPPA and the Design Regulation is

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194. Compare S. 3728 § 2(a) (defining a fashion design as "the appearance as a whole of an article of apparel, including its ornamentation," and as made up of original elements as well as the arrangement of original and non-original elements), with Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 3(a) (defining design as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation").

195. S. 3728 § 2(c).

196. *Id.* § 2(a).

197. Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 4(1). Under the Design Regulation, a design is "considered to be new if no identical design has been made available to the public," *id.* at art. 5(1), and considered "to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public." *Id.* at art. 6(1).

198. See *id.* at art. 8(1).

199. S. 3728 § 2(e)(2).

200. See Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 6(1).

201. Compare S. 3728 § 2(d), with Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 11(1). However, the Design Regulation also grants protection to registered designs for a term of five years, renewable in five-year installments for up to twenty-five years. Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 12.



strikingly similar.<sup>202</sup> Finally, both the IDPPPA and the Design Regulation contain an exception to infringement for private, non-commercial creations.<sup>203</sup>

Given all these similarities, it appears the bill's sponsors used the Design Regulation as inspiration. As such, the sponsors would likely have been aware of how the European courts interpret the Design Regulation; it is therefore logical to assume the sponsors intended the IDPPPA to be interpreted the same way. Numerous attempts to pass protection in a form different from the Design Regulation have been made in the past and failed. Perhaps Congress has finally realized that the only way for fashion-design protection to succeed in this country is to do it the European way.

#### *D. Interpreting the IDPPPA*

Looking at European case law could provide U.S. courts with guidance in interpreting the IDPPPA. Europe has consistently protected fashion designs and has reaped the rewards of doing so. By interpreting U.S. design laws similar to those of the European Union, the United States can "strengthen [its] relationship and increase trade with the member countries."<sup>204</sup> Thus, U.S. courts should defer to the European Union's experience in design-protection litigation<sup>205</sup> and interpret the IDPPPA in light of Congress's likely modeling of the IDPPPA after the Design Regulation. This would not be the first time Congress has striven to harmonize U.S. intellectual property laws with those of the European Union. When Congress extended the copyright term of protection to life plus seventy years, "a key factor . . . was a 1993 European Union (E.U.) directive instructing E.U. members to establish a copyright term of life plus 70 years."<sup>206</sup>

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202. Compare S. 3728 § 2(e)(2) (providing that copying has not occurred if a design "is the result of independent creation"), and S. 3728 § (2)(e)(1) (providing that it is not infringement if the design was created without knowledge—"either actual or reasonably inferred from the totality of the circumstances"—of the protected design), with Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 19(2) (providing that infringement of an unregistered design can only occur when copying of the protected design takes place and that if the allegedly infringing design results from independent creation by a person reasonably thought not to be familiar with the protected design, then copying has not occurred).

203. Compare S. 3728 § 2(e)(3), with Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 20(1)(a).

204. Black, *supra* note 18, at 518–19.

205. The European Union has had a unified design protection system in place since March 6, 2002; thus, the European Union has more than eight years of experience in design-infringement cases. See Council Regulation (EC) No. 6/2002, *supra* note 52, at art. 111(1) n.11.

206. *Eldred v. Ashcroft*, 537 U.S. 186, 205 (2003). E.U. members were directed "to deny this longer term to the works of any non-E.U. country whose laws did not secure the same extended term." *Id.* Thus, Congress extended the term of protection with the Copyright Term Extension

The E.U. design cases discussed above interpreted the law appropriately and should be used to assist American courts in their interpretation of the IDPPPA. Comparing the provisions of the IDPPPA with the European Union's interpretation of its Design Regulation leads to several conclusions on how U.S. courts should interpret the IDPPPA. First, to prove that a design right exists, the plaintiff should have the initial burden of pleading that (1) the design was made available to the public under such circumstances that it could reasonably be inferred that the defendant was aware of the protected design; (2) the design was made available within three years of the date upon which the alleged infringement occurred; and (3) the design contains specified elements that create a distinctive overall impression on an informed user. To meet the first two requirements, the plaintiff could provide evidence of the date the article was first offered for sale to the public, as well as the date the alleged infringement was first manufactured or offered for sale.<sup>207</sup> To meet the third requirement, designers or employees who worked on the article could give testimony about the unique features of the article.<sup>208</sup>

If the plaintiff meets this burden, the court should treat the design right as valid. The burden of proof would then shift to the defendant to establish any grounds for invalidity. To contest validity, the defendant would need to prove either that the characteristics pleaded are not the result of the "designer's own creative endeavor" or that the characteristics do not "provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles."<sup>209</sup> The defendant could carry this burden by producing evidence of one or more designs previously made available to the public whose overall impression is substantially identical to the overall impression of the challenged design as a whole.<sup>210</sup> If the defendant fails to prove invalidity, the court should continue to treat the design right as valid and consider the defendant's infringement.

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Act "to ensure that American authors would receive the same copyright protection in Europe as their European counterparts." *Id.* at 205–06.

207. See S. 3728 § 2(g)(2).

208. Such unique features might include fabric mixtures, trim and stitching detail, or the fit of the article itself. See *Karen Millen Ltd. v. Dunnes Stores*, [2008] 2 I.L.R.M. 368, 387 (H. Ct. (Ir.)).

209. S. 3728 § 2(a)(2).

210. It would not be sufficient to provide evidence that the overall impression of the whole challenged design is substantially identical to that of a combination of elements from several different designs previously made available to the public. See *supra* notes 123–26 and accompanying text. However, if the overall impression of the whole challenged design is substantially identical to a portion of a previously released design, that should be sufficient to prove invalidity. See *supra* note 127 and accompanying text.

The plaintiff would then have the burden of proving infringement. To prove infringement, the court would first have to determine what an informed user would know about the design corpus. The informed user need not be someone who is aware of every design made available to the public, but she should be more knowledgeable than the average consumer.<sup>211</sup> Although the IDPPPA does not require the overall impression to be taken from an informed user's perspective, this is certainly the proper viewpoint. A person unaware of a design's necessary and unnecessary elements might quickly conclude two articles are "substantially identical" because she cannot appreciate the broader differences offered by a designer, specifically those outside the article's functional requirements.

To infringe an unregistered design under the IDPPPA, copying must have occurred.<sup>212</sup> A court may infer copying if the alleged infringement is substantially identical to the protected design.<sup>213</sup> Courts should consider the details of both products and determine what the most important feature of the design is or, rather, what the most visible feature is. If the differences are barely noticeable, and thus trivial, they will not be enough to defeat the overall-impression test.<sup>214</sup> Such trivial differences might include different textures or the lack of the protected design's logo.<sup>215</sup> If the court considers all these aspects and finds that copying occurred, the burden of proof should shift to the defendant to prove otherwise.

This is a strong and proper interpretation of the IDPPPA because it creates a high standard without overburdening the plaintiff. While the plaintiff has the initial burden of proof, he is not required to bring in every design ever created as evidence that her design is original. Furthermore, applying the test of infringement from the point of view of someone familiar with design constraints is the most dependable standard because it prevents uninformed individuals from jumping to conclusions about design resemblance and thus liability.

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211. See *Karen Millen*, 2 I.L.R.M. at 390-91. Such a person might be a consumer interested in fashion, particularly one who is knowledgeable in designers and trends.

212. An article is not considered to be a copy if the design resulted from independent creation. S. 3728 § 2(e)(2). Thus, an alleged infringer can avoid liability by showing that the design in question was created independently of the protected design.

213. Substantially identical means the alleged infringement and the protected design give the same "overall impression" as from the eyes of an informed user. See S. 3728 § 2(e)(2).

214. The Appendix to this Note provides an example of trivial differences.

215. A difference in quality could be enough to defeat the overall-impression test, but only if the difference is noticeable when comparing the design itself to the alleged infringement. See *supra* notes 95-96 and accompanying text.

## V. IMPACT

The IDPPPA offers a scenario in which consumers can dress stylishly at reasonable prices and fashion designs receive the protection they deserve as creative endeavors. While designers would experience benefits from the new protection, consumers and retailers would not likely be drastically affected by the legislation.

## A. Designers

The lack of design protection especially affects young designers.<sup>216</sup> New designers typically do not have strong logos, leaving them without trademark protection.<sup>217</sup> Therefore, passage of the IDPPPA would likely have the biggest impact on up-and-coming designers who would be able to enter the fashion market without fear of having their designs stolen out from under them before they could reap the rewards of their work. Moreover, these young designers would likely take advantage of this strong new weapon against infringement:<sup>218</sup> “Under existing law, small designers already file suit. In the Forever 21 suits . . . , many [were] by small designers.”<sup>219</sup>

Enactment of the IDPPPA would benefit well-established designers as well.<sup>220</sup> At present, when infringement of a design occurs, often a designer’s only option is to send a cease-and-desist letter and hope the “moral and uncertain legal arguments” contained therein persuade the infringing party to stop.<sup>221</sup> The IDPPPA would give new power to these cease-and-desist letters, likely leading copiers to settle out of court.<sup>222</sup>

Furthermore, “[m]ore foreign based designers may be inclined to bring their talents to the United States if they were granted protection, resulting in an increase in commerce, as well as employment opportunities in the United States.”<sup>223</sup> Purchasers of haute couture pieces are also more likely to commission work from American de-

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216. Beltrametti, *supra* note 155, at 162.

217. *See id.* at 163–64 (“More settled designers rely on their well-established trademarks as these are the essence of their revenues and profits, because they are protected by anti-counterfeiting provisions.”).

218. *See* Hemphill & Suk, *supra* note 157, at 1192 (“[F]ashion is no different from other areas of copyright, patent, and trademark, in which small plaintiffs are able to invoke their rights, sometimes with the assistance of counsel retained on a contingency basis.”).

219. *Id.*

220. *See* Beltrametti, *supra* note 155, at 163.

221. *Id.*

222. *Id.*

223. Julie P. Tsai, Comment, *Fashioning Protection: A Note on the Protection of Fashion Designs in the United States*, 9 LEWIS & CLARK L. REV. 447, 467 (2005).

signers if protection is established because they would be assured that the design is truly original and not a knockoff flooding the market.<sup>224</sup>

Finally, because the IDPPPA only prohibits close copying, it “recognize[s] that part of the nature of fashion is cross-pollination,” still allowing designers to gain inspiration from past designs.<sup>225</sup> This limitation is important because it provides for protection without stifling designers’ creative process.

### B. Retailers

As one commentator stated, “The aim of any legislation ought to be the prevention of knockoffs and fakes, but not at the expense of significantly limiting derivative works at different price points.”<sup>226</sup> The IDPPPA accomplishes this, whereas its predecessors would have left low-cost retailers at risk of lawsuits. H&M and Zara are low-cost retailers famous for imitating designer fashions, yet they originated in Europe while subject to European fashion-design laws.<sup>227</sup> These retailers continue to do business in Europe. Therefore, if the IDPPPA—which is similar to the European Union Design Regulation—passes, low-cost retailers in the United States would also be able to do business without fear of excessive litigation.<sup>228</sup>

The key is to steer clear of manufacturing and marketing substantially identical articles of clothing. “[T]here is a significant difference between a knockoff artist or counterfeiter who copies a design line by line with no original input and a follower who closely copies many elements of an earlier design to create a substantially similar item.”<sup>229</sup> While H&M and Zara do not engage in close copying, some retailers like Forever 21 do.<sup>230</sup> If the IDPPPA passes, retailers such as Forever 21 may find themselves forced to hire original designers to stay in bus-

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224. Anne Theodore Briggs, *Hung out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 211 (2002).

225. Beltrametti, *supra* note 155, at 172.

226. Susanna Monseau, *European Design Rights: A Model for the Protection of All Designers from Piracy*, 48 AM. BUS. L.J. 27, 67 (2011).

227. See Hemphill & Suk, *supra* note 157, at 1192.

228. H&M and Zara avoid close copying when selling products in Europe, and, when these products are sold in the United States, these retailers continue to avoid close copies. See *id.* If U.S. retailers can learn to follow this example, they should not be adversely affected by the passage of the IDPPPA.

229. Monseau, *supra* note 226, at 67.

230. Between 2003 and 2008, fifty-three lawsuits were filed against Forever 21, most of which alleged close copying. Hemphill & Suk, *supra* note 157, at 1173. Only two suits were filed against H&M, with at most one close-copying complaint. *Id.* No suits were filed against Zara. *Id.*

iness.<sup>231</sup> Although such an addition would be an extra cost to the retailers, it would greatly benefit the public by increasing jobs and increasing consumer design choices.<sup>232</sup> The IDPPPA would act as the motivating factor for retailers such as these to make changes substantial enough to differentiate their designs from those that inspired the design.

### C. Consumers

Consumers tend to benefit from the copying of designs because they can get copies at a lower cost than the original. Consequently, opponents of protecting fashion designs argue that passage of the IDPPPA would hurt consumers by increasing clothing prices and putting certain items beyond some consumers' price ranges.<sup>233</sup> However, if low-cost retailers such as H&M and Zara are not drastically affected, consumers should not be either. Stylish low-cost options should still be available to consumers so long as retailers avoid line-by-line copying.

Designer clothing prices are also likely to stay the same,<sup>234</sup> or may even decrease, because costs related to potential infringement should decrease. American designers are forced to charge a premium on new designs to offset the loss of sales that results from the designs being copied and sold at lower prices.<sup>235</sup> "If design protection laws were implemented, designers could charge less for each design, knowing that their investment would be returned over a longer period of time," ultimately benefiting consumers.<sup>236</sup> Furthermore, granting protection to designs gives designers an "increased opportunity to monopolize on their creativity," leading more designers to develop "ready-to-wear collections comprised of affordable versions of their couture and designer works."<sup>237</sup>

The IDPPPA's allowance for only short-term protection also furthers consumer interests because designs should enter the public domain while they are still "stylish," giving consumers an opportunity to purchase the design at a lower cost later on.<sup>238</sup> Moreover, if the

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231. See Beltrametti, *supra* note 155, at 163.

232. *Id.*

233. Lynsey Blackmon, Comment, *The Devil Wears Prado: A Look at the Design Piracy Prohibition Act and the Extension of Copyright Protection to the World of Fashion*, 35 PEPP. L. REV. 107, 145 (2007).

234. *Id.* at 146.

235. See Briggs, *supra* note 224, at 210.

236. See *id.*

237. Blackmon, *supra* note 233, at 146.

238. See Marshall, *supra* note 38, at 328.

IDPPPA succeeds in attracting more designers to the United States, consumers would have more design options. This increase in design competition would also help to keep clothing prices affordable.<sup>239</sup>

#### D. Litigation

Some fear that if the IDPPPA is enacted, Americans' inclination to resolve disputes in the courts would lead to frivolous lawsuits clogging up the system.<sup>240</sup> However, the IDPPPA should be interpreted to prevent only close copying, making the danger of frivolous lawsuits minimal.<sup>241</sup> As noted above, cease-and-desist letters should also play a big role in encouraging parties to settle out of court. Additionally, the European Union has proven that designs can be protected without drastically increasing litigation.<sup>242</sup> If these models are indicative, resorting to the court system should be infrequent in the United States as well. If a case does happen to go to trial, "designers who keep notebooks and dated drawings will be better positioned to rebut any allegation that they have copied an earlier work too closely" while "[r]etailers like Forever 21, which do not employ designers, will have a harder time rebutting evidence of copying."<sup>243</sup>

### VI. CONCLUSION

The current minimal protection afforded fashion designs in the United States is not enough. Fashion designs deserve protection. Granting fashion designs protection would increase innovation and boost the economy. American designers have long sought protection over their original creations, and it is time the United States grants such protection by enacting the IDPPPA. Predecessor bills to the IDPPPA left the standard of infringement much too open-ended. The IDPPPA's much narrower standard grants protection while still assuring designers they can be inspired by others' designs without necessarily infringing on them. This important change has led to substantial support from the fashion industry itself and should result in the IDPPPA's enactment. Given the European Union's experience in design-protection litigation and Congress's likely modeling of the

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239. See Briggs, *supra* note 224, at 212.

240. See Beltrametti, *supra* note 155, at 172.

241. *Id.* at 173.

242. See Blackmon, *supra* note 233, at 145 n.218. Additionally, since Japan and India have afforded similar copyright protection to fashion designs, "there has failed to be an overflow of copyright litigation." *Id.* "[T]he United States system would likely follow suit and abuse of the system would be minimal." *Id.*

243. Monseau, *supra* note 226, at 70.

IDPPPA after the European Community Design Regulation, U.S. courts should interpret the IDPPPA similar to the European Union's interpretation of its Design Regulation. Such an interpretation would neither drastically increase litigation nor harm the majority of consumers and retailers.

True creativity is a remarkable and rare feat. As a leader in innovation and creativity, the United States should be encouraging creative endeavors rather than withholding the means for designers to be successful. Enacting the IDPPPA would be a significant advancement in U.S. intellectual property law, giving American designers the protection necessary to effectively compete with the rest of the world.

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## APPENDIX

AN EXAMPLE OF TRIVIAL DIFFERENCES BETWEEN  
FASHION DESIGNS

Foley & Corinna designed and retailed the dress on the left for \$440, while Forever 21 sold the dress on the right for \$40.<sup>244</sup> There are no significant differences between the two dresses, and if Foley & Corinna were to bring suit under the IDPPPA, a court would likely find these dresses substantially identical.

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244. Donny Shaw, *Should Congress Protect Fashion Designers Against Imitations?*, OPENCONGRESS BLOG (May 21, 2008), <http://www.opencongress.org/articles/view/508-Should-Congress-Protect-Fashion-Designers-Against-Imitations>.